

STATE OF MICHIGAN  
COURT OF APPEALS

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BARBARA SEGER,

Plaintiff-Appellee,

v

EMCON ASSOCIATES, INC.,

Defendant,

and

WILLIAM R. MARTIN & SONS, INC.,

Defendant-Appellant.

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UNPUBLISHED  
February 19, 2008

No. 274827  
Macomb Circuit Court  
LC No. 05-002192-NI

Before: Bandstra, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Defendant William R. Martin & Sons, Inc. (“defendant”), appeals by leave granted from a circuit court order denying its motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that the trial court erred in denying its motion for summary disposition of plaintiff’s negligence claim because it did not owe plaintiff a duty of care separate and distinct from its contractual obligation to install an animal habitat unit at a pet store. Plaintiff, an employee at the store, was injured when the unit fell over and pinned her hand.

This Court reviews a trial court’s decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In addition, whether a defendant owes a duty toward a plaintiff is a question of law that is reviewed de novo. *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004).

In *Fultz*, the plaintiff brought a claim against a snow removal contractor for injuries that the plaintiff sustained while crossing a snow-covered and ice-covered parking lot. The plaintiff claimed that the contractor was negligent for failing to plow the lot. The Court rejected the plaintiff’s claim that the defendant had a common-law duty to exercise reasonable care in performing its contractual duties. The Court characterized as “defective” the distinction between

misfeasance and nonfeasance of a duty as a basis for analyzing the existence of a duty. *Id.*, p 467. The Court explained:

[L]ower courts should analyze tort actions based on a contract and brought by a plaintiff who is not a party to that contract by using a “separate and distinct” mode of analysis. Specifically, the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant’s contractual obligations. If no independent duty exists, no tort action based on a contract will lie.

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[I]f defendant fails or refuses to perform a promise, the action is in contract. If defendant negligently performs a contractual duty or breaches a duty arising by implication from the relation of the parties created by the contract, the action may be either in contract or in tort. In such cases, however, no tort liability arises for failing to fulfill a promise in the absence of a duty to act that is separate and distinct from the promise made. [*Id.*, pp 467, 469-470.]

The Court discussed *Osman v Summer Green Lawn Care*, 209 Mich App 703; 532 NW2d 186 (1995), overruled in part on other grounds *Smith v Globe Life Ins Co*, 460 Mich 446, 455-456 n 2; 597 NW2d 28 (1999), as an example of a breach of duty that was separate and distinct from a contractual duty. The plaintiff in that case also sought to recover from a snow removal contractor for injuries she sustained when she fell. However, the plaintiff did not claim that the defendant failed to perform, as in *Fultz*, but rather that it had created “a new hazard” by its placement of the snow where it would melt and refreeze on walkways. According to the Court, a defendant that creates a new hazard breaches a duty that is separate and distinct from its contractual duties. *Fultz*, *supra*, p 469.

In this case, the trial court erred in denying defendant’s motion for summary disposition because defendant did not owe plaintiff a duty that was separate and distinct from its contractual obligation to install the animal habitat unit. The unit was on the sales floor when defendant first encountered it. Defendant’s allegedly inadequate method of securing the unit did not create a “new hazard;” the hazard posed by the unit already existed. Defendant’s contractual duty to secure it is comparable to the contractual duty to remove snow in *Fultz*, *supra*. In both instances, the contractual obligation related to the reduction or elimination of an existing hazard. Negligence in performing that contractual obligation did not create a new hazard that imposed a separate and distinct duty owed by defendant to plaintiff.

Although defendant also asserts that plaintiff is not a third-party beneficiary of the subcontract between it and Emcon Associates, Inc., plaintiff concedes that she is not pursuing a third-party beneficiary theory. Therefore, it is unnecessary to address that issue.

Reversed.

/s/ Richard A. Bandstra  
/s/ Pat M. Donofrio  
/s/ Deborah A. Servitto